

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

NICOLE BROECKER, : 21CV638 (KAM)

Plaintiff,

: United States Courthouse
-against- : Brooklyn, New York

NEW YORK CITY DEPARTMENT OF EDUCATION, ET AL. : November 23, 2021
: 12:00 p.m.

Defendant.

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TRANSCRIPT OF CIVIL CAUSE FOR ORDER TO SHOW CAUSE
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: THE SCHER LAW FIRM, LLP
One Old Country Road, Suite 385
Carle Place, NY 11514
BY: AUSTIN R. GRAFF, ESQ.

Court Reporter: **SOPHIE NOLAN**
225 Cadman Plaza East/Brooklyn, NY 11201
NolanEDNY@aol.com

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1 (In open court.)

2 (The Hon. Kiyo A. Matsumoto, presiding.)

3 THE COURTROOM DEPUTY: This is an order to show
4 cause hearing, docket number 20cv6387, *Broecker versus New*
5 *York City Department of Education and United Federation of*
6 *Teachers Local 2, American Federation of Teachers AFL-CIO.*

7 Will counsel on behalf of all plaintiffs state your
8 appearances.

9 MR. GRAFF: Good afternoon. Austin Graff from the
10 Sher Law Firm.

11 THE COURTROOM DEPUTY: Counsel, state your
12 appearance and whom you represent.

13 MS. O'CONNOR: Good afternoon, Your Honor. Andrea
14 O'Connor representing the New York City Department of
15 Education.

16 THE COURT: Good afternoon. Thank you.

17 MR. MENDEZ: Good afternoon, Your Honor. Ivan
18 Mendez representing the Department of Education.

19 THE COURT: Which of you is speaking for the
20 Department of Education?

21 MS. O'CONNOR: I will, Your Honor.

22 THE COURT: Thank you, sir.

23 Thank you, ma'am.

24 MS. KOLKER: Dina Kolker from Strook & Strook for
25 United Federation of Teachers.

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1 THE COURT: Good afternoon.

2 And, sir?

3 MR. KLINGER: Your Honor, Alan Klinger from Strook
4 as well as. Ms. Kolker will be the lead for us.

5 THE COURT: All right, thank you.

6 I just want to note that certainly spectators are
7 always welcome in federal courtroom. I would have appreciated
8 a heads up from plaintiff's counsel because as you do know we
9 have restrictions in place to safeguard the public safety. I
10 would have arranged for an overflow room or video feeds. Many
11 of these requests came in literally an hour before the
12 hearing. We are trying hard to arrange and accommodate so
13 that folks can observe, but in the future going forward it's
14 really important to let the court know that you have these
15 needs.

16 MR. GRAFF: My apologies, Your Honor.

17 THE COURT: I want to establish some ground rules
18 for those present here today. First, it is important for
19 everybody to remain calm and professional, those who are on
20 video or those who are participating here in the court. We
21 are not going to permit any unruly behavior or outbursts or
22 comments. I am sure as teachers and administrators you have
23 had that situation where you had to instruct those in your
24 classrooms that certain conduct is okay and certain conduct is
25 not okay and certainly that pertains in federal court.

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1 Second of all, recordings, videotaping or
2 photographing of anything is absolutely prohibited. We have a
3 court reporter here who is making an official transcript of
4 today's record and that will be what will govern any record in
5 this case. Disseminating videos or recordings is forbidden by
6 this court and it will be deemed a contempt.

7 Third of all, I appreciate all of you wearing masks.
8 Masks must cover the nose and mouth at all times in this
9 courtroom and if you become uncomfortable or cannot wear your
10 mask, I ask that you please step outside the courthouse so you
11 can remove your mask.

12 Now, Mr. Graff, this is your order to show cause.
13 You have submitted papers, I would note, 44 days after your
14 clients were placed on leave without pay status, from what I
15 understand on October 4th. But let me ask you the more
16 fundamental question with regard to standing which you did not
17 address in your papers and I do not believe your papers even
18 discussed the impact of the impact arbitration agreement that
19 had been entered between the various unions representing the
20 teachers, the administrators and supervisors and the DC 37
21 employees.

22 My question to you, and there's case law to support
23 my concern, is why do your clients have standing to bring this
24 case if their chosen bargaining unit has entered into this
25 arbitration award -- I'm sorry, the impact arbitration

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1 agreement that binds the course of the implementation and the
2 remedies. It's incorporated by reference in the collective
3 bargaining agreements and it is an agreement that their chosen
4 representative entered into to govern any disputes arising as
5 a result of the vaccine mandate.

6 MR. GRAFF: Thank you, Your Honor, for hearing us
7 today.

8 THE COURT: Please sit down. Unfortunately you will
9 have to project.

10 MR. GRAFF: Thank you, Your Honor, for hearing us
11 today. The arbitration award was not an agreement. The union
12 did not sign off on it. It was -- the union and the New York
13 City Department of Education reached impasse on impact
14 bargaining. That is under New York Civil Service Law Section
15 209. Section 209 says that if there is an impasse in
16 collective bargaining, then the PERB, the Public Employment
17 Relations Board, appoints a mediator. The mediator tries to
18 work out a deal.

19 In this situation, a deal could not be struck and
20 the parties somehow agreed that this mediator could impose
21 whatever he chose to impose, but that violates the Civil
22 Service Law Section 209.3(e) -- I'm sorry, 209.3(f). Under
23 the civil service law, a factfinding decision cannot be
24 imposed upon a school district. So, what they did was they
25 came to an agreement that there would be impact bargaining.

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1 Impact bargaining resulted in arbitration which was actually a
2 factfinding decision under section 209.3(f). Under the law of
3 New York State it cannot be imposed upon a school district.

4 Now, if New York City Department of Education does
5 not fall within Section F, Section E which permits the
6 legislative body to impose the factfinding decision and in
7 this situation the legislative body has not acted. Separate
8 and apart from that, if the union is going to say or the
9 Department of Education is going to say that arbitration was
10 pursuant to the collective bargaining agreements, the
11 consulting agreements say that the arbitrator overstepped his
12 bounds. The teachers union Article 22, Section C on page 176
13 of the collective bargaining agreement states --

14 THE COURT: Did you raise any of this in your
15 papers?

16 MR. GRAFF: I didn't get a reply.

17 THE COURT: Okay. Well, could you have briefed it
18 in your initial moving papers so that we could have a clear
19 idea of what the real grounds -- the real landscape was? I
20 think this agreement is important and if you think that it
21 doesn't bind you on -- your clients and it shouldn't have been
22 entered into or it's somehow invalid or unlawful, you should
23 have laid it out in your papers because you have asked for
24 expedited relief. You have asked for expedited relief by this
25 court.

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1 MR. GRAFF: Yes.

2 THE COURT: You have asked the defendants to respond
3 in an expedited manner, but you didn't give us a full picture.
4 And, yes, you could have had a reply if you hadn't waited so
5 long to file your papers. But we got your papers last week
6 around 5 o'clock. We instantly read them, issued an order to
7 show cause to the defendants. They worked virtually within 24
8 hours to put in papers by Friday. We spent the weekend
9 reviewing the papers and, you know, it would have behooved
10 you, I think, to have given us a little bit better information
11 because right now you are just reciting agreements and
12 provisions that are not before me.

13 My question was a little more basic. Show me you've
14 got standing.

15 MR. GRAFF: What I was going to say is that the
16 union's collective bargaining agreements which are before you
17 do not permit the arbitrator to, in any way, violate or change
18 applicable law or rules or regulations having the force and
19 effect of law.

20 What the arbitrator did here is violate the
21 Constitutional rights of the plaintiffs by saying that they
22 could be on unpaid leave and also without providing due
23 process. One of the issues we have in the papers that have
24 been submitted, Your Honor, is there's a conflict: What's
25 going to happen on December 1? The teacher's union says that

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1 on December 1st the DOE has to go through the 3020(a) process
2 or the procedural due process. And that's what we're asking
3 for. The New York City Department of Education says we can
4 unilaterally terminate.

5 THE COURT: We're going to get to that conflict.
6 It's an obvious conflict but, all right, why don't we have the
7 union or the DOE respond to your position that they were
8 without authority to enter into this impact arbitration award.

9 I mean, the union, I believe in their papers,
10 indicated that they took prompt action to challenge the DOE's
11 plan and as a result on an expedited basis after the mandate
12 was issued in August, I believe, they were able to expedite
13 and everybody worked very hard to get some sort of an
14 agreement with the representatives for your clients by
15 September -- before September 25th when the school year
16 started, but let me --

17 MR. GRAFF: If I could just respond to that.

18 THE COURT: Yes, go ahead.

19 MR. GRAFF: There was no agreement. There was an
20 arbitrary ruling imposed and the Second Circuit just recently,
21 over the last several days, has said that there was problems
22 with the arbitration and sent it back because it violated
23 Title VII. There are problems with the arbitration.

24 THE COURT: So this particular arbitration violated
25 Title VII?

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1 MR. GRAFF: The way it's being implemented, yes. I
2 believe that's what the holding is and it came out on the
3 15th. I have it --

4 THE COURT: It came out on the 15th. Why didn't you
5 put that in your papers which you filed on the 17th?

6 MR. GRAFF: I'm sorry, Your Honor, I did not.

7 If the plaintiffs --

8 THE COURT: Wait. Which case is that, sir?

9 MR. GRAFF: It's Kane versus DeBlasio, index number
10 21-2678-CV, and it talks about --

11 THE COURT: Sir, you are reading very fast and you
12 are not reading clearly. Please speak slowly and clearly.

13 MR. GRAFF: Paragraph two of the order says: Such
14 consideration shall adhere to the standards established by
15 Title VII of the Civil Rights Act of 1964, the New York Human
16 Rights Law and the New York City Human Rights Law. Such
17 consideration shall not be governed by the challenged criteria
18 set forth in IC of the arbitration award for the United
19 Federation of Teachers members. Accommodations will be
20 considered for all sincerely held religious observances,
21 practices and beliefs.

22 THE COURT: All right. I don't know what the
23 circumstances of that case are. Reading me an excerpt of a
24 decision, I don't know what the basis of that challenge was or
25 whether they even raised Title VII claims, but I will take a

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1 look at that, okay? Thank you. Is there is there anything
2 else?

3 MR. GRAFF: The issue here, and it's not addressed
4 in any of the papers is my clients have a right to their pay,
5 a Constitutional right to their pay. They do not cite to the
6 *Veronca* (ph) case or any of the Second Circuit cases cited in
7 our briefs regarding the right to pay. In fact, the Second
8 Circuit in that same case said if a plaintiff -- paragraph
9 five: If a plaintiff's request is granted by the Citywide
10 panel, the plaintiff will receive back pay running from the
11 date they were placed on leave without pay.

12 They're raising issues and the UFT filed a complaint
13 in the early stages of the vaccine mandate which alleged that
14 there was a violation of the plaintiff's due process rights.
15 Those issues were not decided by the state court because
16 the -- there was an issue -- they decided on a different
17 ground regarding the religious and disability exemptions. But
18 in this situation, my clients no matter when we filed they had
19 a violation of their Constitutional rights, whether was the
20 day before December 1st or several days before like we did.
21 The delay is still a Constitutional violation. It's not
22 harming the DOE or the UFT. It's harming my plaintiffs.

23 THE COURT: Well, my understanding is that even as
24 late as November 15th -- let me ask you, how many of your
25 clients actually invoked the procedures of seeking a religious

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1 or medical exemption?

2 MR. GRAFF: I don't know the exact number of them.

3 THE COURT: Did any of them?

4 MR. GRAFF: Yes.

5 THE COURT: My understanding based on the defense
6 papers is that only seven of the 80 some-odd did. Does that
7 sound accurate?

8 MR. GRAFF: That sounds about right.

9 THE COURT: So the rest decided to forego those
10 procedures and come to federal court, is that it?

11 MR. GRAFF: Yes, but we're talking about the vaccine
12 mandate here. We're talking about their constitutional right
13 to pay and their constitutional right to due process.

14 THE COURT: Well, the vaccine mandate is the
15 catalyst for the ultimate conclusion by the Department of
16 Education that those who did not avail themselves of the
17 vaccine by a date certain were no longer deemed to be fit for
18 duty or qualified for duty.

19 MR. GRAFF: Yes.

20 THE COURT: So based on that, I understand the DOE
21 takes the position that because this is not a disciplinary or
22 competency or performance issue, it is a qualification or a
23 fit-for-duty issue they don't have to go through the 3020
24 procedures. But the union I believe thinks that that would be
25 the proper vehicle. So we'll get to that.

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1 MR. GRAFF: Your Honor --

2 THE COURT: But I would like to ask either the DOE
3 or the union to respond to your argument that this was not a
4 lawful or appropriate process by the chosen representatives to
5 resolve on a very expedited basis this vaccine mandate.

6 Who wants to be heard on the defense side of the
7 table?

8 MS. KOLKER: Dina Kolker for the UFT.

9 I think there's a little bit of confusion between
10 contractual grievances in arbitrations which are things that
11 operate pursuant to the collective bargaining agreement that
12 are limited to, in large part, violation or misinterpretation
13 of the collective bargaining agreement that could ultimately
14 go to an arbitrator and arbitration in connection with
15 collective bargaining or new contractual terms which is what
16 we have here.

17 We had the health order issued by the Department of
18 Health and Mental Hygiene impacting the City's schools. The
19 union, the UFT as well as other unions involved in this moved
20 on parallel tracks. They challenged the mandate itself in
21 state court and I have to correct counsel, the judge in state
22 court initially granted a TRO primarily because the initial
23 health order did not provide for religious and medical
24 accommodations. When that TRO was issued, the Department of
25 Health and Mental Hygiene issued a revised order explicitly

1 taking note of that and correcting it based on the union's
2 efforts in that case.

3 And then the unions briefed the remainder of the due
4 process issues before the Supreme Court New York County and
5 ultimately that court decided against the unions upholding the
6 vaccine mandate and that has been the result as is laid out in
7 the papers in every one of the challenges that we're aware of,
8 both in New York State and outside of New York State to these
9 types of vaxx mandates.

10 Recognizing that that may be the result of a court
11 challenge, the risk to move on a parallel track to negotiate
12 the implementation of this mandate. The mandate in general
13 says, beyond this date people are who not vaccinated taking
14 into account the religious and medical accommodations, cannot
15 be present in school buildings with children who, particularly
16 at the time, were not, in large part, even able to be or even
17 eligible to be vaccinated.

18 So, the health order limits who can show up in a
19 school basically. The union sought to implement how to
20 negotiate -- how that was implemented specifically because it
21 understood the concerns for those who chose for their own
22 reasons not to become vaccinated and recognizing that they
23 could soften the impact on the people who chose not to be
24 vaccinated regardless.

25 With the first day of school looming, that

1 bargaining had major issues between the parties not resolved.
2 They filed a declaration of impasse with the state Public
3 Employee Relations Board which administers the state public
4 employee relations law. The City and the DOE did not oppose
5 that. A mediator was assigned and breakneck mediation then
6 proceeded to try to reach agreement.

7 When that did not resolve all of the issues between
8 the parties, they agreed to move to expedited arbitration of
9 the issues which is what resulted in the arbitration award.
10 Now, it's true that the state Taylor Law the Public Employee
11 Relations Law in New York state, does have a procedure for
12 school districts where if there is an impasse you can go to
13 mediation and go to factfinding which is a longer arbitration
14 process that results in a recommendation which is designed to
15 assist the parties in ultimately reaching agreement.

16 The fact that that's the default statutory process
17 does not mean that the parties cannot agree to have that
18 factfinding panel or a different arbitrator issue a binding
19 award at the end of that process in which in light of the
20 urgency of the approaching beginning of school and the
21 approaching deadline of the health order itself which was
22 issued by the Department of Health that some sort of clarity
23 and finality was required, the parties agreed that it would be
24 a binding arbitration process and that's the award that
25 resulted.

1 Other unions also entered into arbitration. Other
2 unions negotiated agreements regarding the implementation of
3 the mandate. For the UFT in particular and I believe the
4 principal's union it was expedited arbitration that resulted
5 in an award. That award becomes part of the collective
6 bargaining agreement under state law. The terms of that award
7 to the extent they conflict with existing terms in the
8 collective bargaining agreement become part of the collective
9 bargaining agreement that is now binding upon the union and
10 the employer.

11 There are vehicles for challenging an arbitration
12 award under Section 75 and the CPLR in state court, but that's
13 not where we are right now.

14 THE COURT: Well, is that a process that plaintiffs
15 may avail themselves of to challenge what has happened?

16 MS. KOLKER: So the collective bargaining agreement
17 is between the union and the employer. I think the City
18 addressed to some extent this issue of who can challenge the
19 arbitration award between the union and the employer in court
20 under Article 75 of the CPLR, but I think that one of the
21 things to keep in mind on this is that there's two separate
22 things that plaintiffs are talking about.

23 There is those groups of people who are placed on
24 leave without pay during this period through December 1st
25 where the arbitration award provides and the union fought hard

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1 for various actions that they could collect from or take
2 advantage of. And then there's what happens after December
3 1st. In the UFT's view, what the arbitration award clearly
4 provides on its face is that they can't seek to separate from
5 service, to terminate, any of the people who have not yet
6 become vaccinated or received an accommodation, et cetera
7 before December 1st, right? It's a limitation that they will
8 not seek to terminate anyone before December 1st.

9 And in large part that was to provide enough time
10 for people to see how their accommodation application may have
11 worked out or the resulting appeal, what their options are in
12 terms of either separation with incentive or the ability to
13 extend leave with health coverage September 5th of 2022. So
14 people could take stock of their options and choices and make
15 a decision. The arbitration award then says after December
16 1st the DOE can seek -- not that it can terminate -- it can
17 seek to terminate people who have not complied or chosen any
18 of the actions.

19 THE COURT: So what does that look like in your
20 view?

21 MS. KOLKER: The UFT's view is that there are
22 available right now before the arbitration award was issued,
23 now that the arbitration award was issued, various avenues
24 that the DOE has to seek to separate someone from service on
25 different grounds. None of those have been changed. One of

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1 those did 3020(a) process for handling disciplinary charges.

2 For certain other employees, there's contractual processes.

3 All of these remain intact and it is the UFT's
4 position that should the DOE seek to terminate someone after
5 December 1st they would have to comply with existing
6 procedures. Now, until all the papers are filed in this case,
7 it has not been communicated to the UFT what specifically the
8 DOE intended to do after December 1st, what avenue it intended
9 to take or that it was actually terminating people right after
10 December 1st and the union has always taken the position, and
11 took the position during the arbitration process that resulted
12 in the award, that the union believes all the existing due
13 process that is available is applicable and when the DOE
14 decides what it's going to do after December 1st, the UFT will
15 respond to accordingly, but we have to separate this question
16 of the leaves and the various options provided for in the
17 award and what happens after December 1st, which the award
18 doesn't speak to.

19 THE COURT: Let me ask Mr. Graff, of the seven
20 plaintiffs that you represent who have sought accommodation,
21 how many of those seven have actually sought to go through the
22 appeals process to seek a three arbitrator panel to review?

23 MR. GRAFF: I know there's at least one and I
24 believe she's --

25 THE COURT: Well, who is it.

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1 MR. GRAFF: Ms. Lamb.

2 THE COURT: Okay. I saw in your papers that one of
3 your clients, Ms. Porcello withdrew her request for
4 accommodation. Is that accurate?

5 MR. GRAFF: I believe that's true.

6 THE COURT: So she did not -- so she's not going to
7 request accommodation. She just doesn't want to take the
8 vaccine is that it or we don't know why?

9 MR. GRAFF: I believe there are a lot of plaintiffs
10 who are choosing not to take the vaccine for either personal
11 or --

12 THE COURT: No, I understand that, but why aren't
13 they seeking relief based through an accommodation request
14 based on either religion or health reasons?

15 MR. GRAFF: Because the thoughts of the plaintiffs
16 are that these requests are being denied without even
17 reviewing the papers.

18 THE COURT: Well, let me ask the DOE, from what you
19 understand and I read Judge Caproni's oral argument, the
20 transcript, they had accommodated over 20 different religions,
21 requests for accommodation for over 100 people. So your view
22 or your clients' view, I believe, is mistaken because at least
23 as of that time which was I think in October the DOE had
24 granted over 100 requests to 20 different religions.

25 Do you have updated information on the DOE's side,

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1 please?

2 MS. O'CONNOR: Yes, Your Honor. This is Andrea
3 O'Connor for DOE. I don't have exact numbers, but that is
4 accurate as of mid-October when Judge Caproni entered an order
5 to show cause in the *Kane* case that was referenced by counsel,
6 the merits panel just yesterday for the Second Circuit just
7 heard argument and has not yet issued a determination in
8 connection with that argument. I believe what counsel was
9 citing was to the motion panel. So the merits of that deal --
10 there has not been a decision issued yet unless it's been
11 issued since I have been here in court.

12 To address the issue of standing, I agree with
13 Ms. Kolker with respect to the process by which the impact
14 arbitration award was reached. It was a lawful process and it
15 is binding on the plaintiffs as union members. And as a
16 result of that there is no ability for an individual employee
17 to challenge the outcome of that lawful arbitration process.

18 And I will also note that while UFT and CSA were two
19 unions for which the plaintiffs belong, for those employees
20 that went down that arbitration track where they reached an
21 impasse and there was arbitration. For DC 37 who is not a
22 party to this case there was an agreement reached and it was
23 not via arbitration. It was through classic bargaining.

24 So particularly for those employees who were covered
25 by the DC 37 agreement, they don't have standing to challenge

1 that either. I can continue on to the merits, but that's with
2 respect to standing.

3 THE COURT: I would like to hear more on standing.

4 MS. O'CONNOR: Sure.

5 THE COURT: I think the plaintiff was done with his
6 standing argument; correct? Basically, you dispute the
7 validity of the process and therefore you think you have
8 standing because your clients don't have to comply with the
9 process that they believe is invalid.

10 MR. GRAFF: There's just one issue that the UFT put
11 forth in their papers. They cite to the case of *Town of Southampton versus New York State Public Employee Relations*
12 *Board*. It's 2 NY 3d 513. And they cite it for the
13 proposition that the award is -- incorporates into the
14 collective bargaining agreement. The problem with that is
15 this was a police award and under the civil service law
16 Section 209, police and fire are different than education.

17 So under the statute, the Education -- it cannot
18 compel the Board of Education to accept an arbitration. Now,
19 if the parties agree to an arbitration, we would never see an
20 arbitration agreement that was signed by both parties
21 entitling the arbitrator to make his award. That's one issue.
22 And the other --

23 THE COURT: Would you agree that it was -- the whole
24 arbitration occurred because UFT sent out a notice of impasse

1 and they invoked the arbitration procedures? Would you agree
2 with that?

3 MR. GRAFF: There is no arbitration provision in
4 Section 209 of the civil service laws.

5 THE COURT: That doesn't mean, sir, that a
6 collective bargaining agreement cannot exist coextensively
7 with the civil service laws. The law has one set of mandates,
8 but the parties may still bargain and reach agreements. I'm
9 not quite sure --

10 MR. GRAFF: If the arbitration is under the
11 collective bargaining agreement then the arbitrator went
12 outside of his authority because he cannot modify or change
13 the law and he did this in this situation because he cut
14 people off from pay and did not provide for due process.

15 THE COURT: But the argument of UFT is that this is
16 not -- this was not within the rubric of the arbitration
17 agreement as it existed then but this was an agreement where
18 the contractual terms of the CBA were altered.

19 Am I understanding your argument correctly?

20 MS. KOLKER: Yes, Your Honor. There is one kind of
21 arbitration that comes at the end of a contractual grievance
22 process where the arbitrator is constrained by the existing
23 collective bargaining agreement because the grievance process
24 limits the arbitrator to misapplications or misunderstandings
25 within the agreement.

1 This is a separate process where the union, the UFT,
2 is in collective bargaining over, in the UFT's view, the
3 mandatory subject of bargaining and the implementation of this
4 mandate with the employer to reach new contractual terms and
5 the process that they invoke first went to across-the-table
6 bargaining, then a declaration of impasse and seeking to have
7 a mediator appointed, intense mediation, and then during that
8 mediation there was an agreement between the parties that it
9 should proceed to binding arbitration, not factfinding as the
10 next step given the urgency of the situation.

11 And, Your Honor, while there isn't a written
12 agreement on arbitration because one wasn't necessary, the
13 parties were attempting to engage in settlement and agreed to
14 this. If you look at the declaration of Alan Klinger at
15 Exhibit C, the parties recorded -- we have Mr. Klinger's
16 e-mail to PERB on the status of mediation and that they had
17 agreed to an expedited arbitration due to the exigencies of
18 these circumstances and fairness of the effective workforce
19 and then discuss when arbitration discussions would be held.

20 This was the written report back to PERB on the
21 status of mediation and the parties' decision memorializing
22 the parties' agreement to move to expedite the arbitration and
23 that was part of the papers we submitted on Friday.

24 THE COURT: One thing I didn't get from the DOE is
25 what does happen after December 1 when the DOE is unilaterally

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1 authorized to seek separation?

2 MS. O'CONNOR: Yes, Your Honor. It is -- it's my
3 understanding that the DOE at some point after December 1st
4 for those individuals who -- and we're talking about a narrow
5 slice. We're talking about those individuals who have
6 essentially taken no action, either they have not applied for
7 a reasonable accommodation, whether it's based on religion or
8 medical. They have not appealed that or if they do not have
9 an appeal pending at that time, they have also not availed
10 themselves of the two different processes that are available
11 to them under the impact arbitration award, both of which
12 would extend their health benefits through September of 2022.

13 We're talking about this group of individuals that
14 have availed themselves of no processes that were afforded to
15 them under the impact arbitration award. And for those
16 individuals at some point after December 1, yes, the DOE will
17 seek to separate them from employment. It is the DOE's
18 position that 3020(a) for those individuals that are covered
19 by 3020(a), so again a subset of the affected employees that
20 are tenured teachers or covered by Section 75 of the Civil
21 Service Law, that the DOE can unilaterally separate them from
22 employment due to the fact that they are not complaint with
23 the lawful, valid Commissioner of Health's order which
24 requires them to be vaccinated.

25 As Your Honor noted at the beginning there is a

1 difference between the DOE and the UFT with respect to the
2 process for unilaterally which the award permits DOE and it
3 specifically states that the DOE may unilaterally seek to
4 separate the employees in that DOE there's significant law
5 requiring that a lawful job requirement -- when an employee is
6 not in complies with the lawful job requirements, that that
7 does not invoke the protection of 3020(a) or Section 75 and
8 when an employee falls out of compliance with that job
9 requirement, the employer is permitted to separate them
10 without process. And that is the DOE's intention after
11 December 1.

12 THE COURT: So, you are able to determine which of
13 the covered employees did not either seek accommodation,
14 pursue an appeal or ask to have their health benefits extended
15 up until 2022? Those employees will be given notice that
16 they're being separated immediately or not?

17 MS. O'CONNOR: Well, to answer Your Honor's first
18 question, yes the DOE can determine which individuals fall
19 into this section. As Your Honor might imagine, it is a
20 moving number that moves daily.

21 THE COURT: So it's not too late for some of these
22 employee to say, look, maybe I'm better off invoking the
23 recommended procedures, which is seek an accommodation, see
24 how far I get; maybe I'll be among those who are granted the
25 accomodation or at least that my health benefits continue

1 until 2022.

2 MS. O'CONNOR: Correct, Your Honor.

3 THE COURT: It's not too late; correct?

4 MS. O'CONNOR: Correct, Your Honor. It is not too
5 late and I want to make sure that I speak correctly. It is
6 not too late. And up until November 30th an employee may
7 elect to extend their leave to September 5th of 2022. This,
8 again, would provide them with health benefits through that
9 entire period of that time. Additionally, if they avail
10 themselves of that separation option or that leave option,
11 pardon me, at any point in time if they come in compliance
12 with the Commissioner of Health's order they can be restored
13 to their same school within two weeks of notifying the DOE
14 that they have now come in compliance with the Commissioner of
15 Health's order. So they have the option to return if they
16 come into compliance. So it is not too late.

17 THE COURT: Do they retroactively receive their
18 benefits and everything else -- not benefits, but I think
19 they're worried about their pensions or other
20 employment-related benefits, status, seniority, whatever else
21 they may want to -- that they have now that they want to
22 preserve.

23 MS. O'CONNOR: If an employee elects the extended
24 leave option and at some point during that extended leave
25 comes into compliance with the Commissioner of Health's order

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1 and seeks to return to the Department of Education, they would
2 not receive back pay for that period of time that they were on
3 leave without pay, no. I do not know the answer with respect
4 to seniority or pension credit. I do imagine with respect to
5 pension credit, since that flows from pay, that that would
6 also not be restored. They would have -- their health
7 benefits would be uninterrupted during that period of time,
8 though.

9 THE COURT: Okay, thank you.

10 So, sir, do you know if any of your clients have
11 gotten vaccinated, any of the 80 some-odd plaintiffs that you
12 named? Have any come into compliance and are they -- are all
13 of the named plaintiffs as stated in the original complaint
14 still actively resisting the vaccine and many of them still
15 not availing themselves of the procedures that were set forth
16 in the binding award?

17 MR. GRAFF: None of the plaintiffs and I speak to
18 them through e-mail every day, no one has told me that they
19 have taken the vaccine. I know that several people are
20 waiting to see what happens in court today because of the
21 November 30th deadline, but no one has, to my knowledge, taken
22 the vaccine that is named as a plaintiff and if they do, I
23 will ask them to be dismissed but I don't think that would be
24 an issue.

25 If I may, Your Honor, just one other point?

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1 THE COURT: Sure.

2 MR. GRAFF: Two things, sorry. One is New York
3 City's Executive Order 75 makes the vaccine -- is a mandatory
4 vaccine requirement for new hires. I don't see anything and I
5 don't think it's been produced by the defendant that says --
6 any entity has said that the vaccine is a job requirement for
7 the New York City Department of Education. Although there's
8 an order from the Department of Health the New York City
9 Department of Education, I have looked online to see if there
10 is anything that they have adopted that says it's a job
11 requirement. It's a job requirement for new hires. It's on
12 the Department of Education's website, all persons newly
13 hired. It doesn't say current employees.

14 And, second, they say it's fitness for duty.
15 Fitness for duty -- and they have meaning under the Education
16 Law. Section 913 of the Education Law permits medical
17 examinations of teachers and other employees to show that
18 there's a fitness for duty and there's a procedure that has to
19 be followed. There is also section --

20 THE COURT: So how is a medical requirement that one
21 get a vaccine not something that is consistent with a
22 definition of fitness for duty?

23 MR. GRAFF: There are some plaintiffs who have had
24 COVID and have antibodies. So the antibodies could be the
25 same as the vaccine.

1 THE COURT: I am not sure the literature is 100
2 percent in your favor on that. I think there's a belief and
3 some evidence that antibodies are a residual of having had a
4 prior COVID infection, but those antibodies diminish over time
5 quite rapidly; in fact, more rapidly than a vaccine would.

6 MR. GRAFF: We also know that the vaccine --
7 whatever the body's reaction to the vaccine, there's also news
8 reports that that's why we have to do a booster.

9 THE COURT: Right. Which is why the public health
10 officials are telling everyone to go out and get a booster.
11 This is a fast-mutating virus, from what I have read, in part
12 because when people aren't vaccinated it has an opportunity to
13 mutate so new strains like the Delta strain can develop and
14 become as devastating or as easily transmissible or more
15 transmissible than the prior strains and that's what happens.
16 It's a disease that public health officials are trying very
17 hard to get an understanding of and get control of and try to
18 thwart and one way is this vaccine process.

19 I will ask the City, the DOE -- the DOE, I'm sorry,
20 to comment to the issue whether the vaccine is now a job
21 requirement regardless of whether you are a new hire or a
22 compliant employee.

23 MS. KOLKER: The Commissioner of Health is a duly
24 authorized state agent in order to promulgate lawful orders to
25 maintain the health and safety of the citizens of the City of

1 New York. And, here the Commissioner Chokski promulgated what
2 everyone can agree is now a lawful order. It has been
3 challenged and upheld and counsel indicated that he is not
4 challenging the lawfulness of the Commissioner of Health's
5 order. That order indicated that no individual may enter a
6 DOE school unless they are vaccinated, again adults, inclusive
7 of DOE employees.

8 That created a job employment for employees similar
9 to a residency requirement. The city has residency
10 requirements with respect to certain titles and classes of
11 employees. When an employee falls out of compliance with
12 those job requirements, it does not invoke the 3020(a) or
13 Section 75 process. Rather, they are ineligible to maintain
14 their employment and that is the case here.

15 Because the plaintiffs are not in compliance with
16 the Commissioner of Health's order, they are ineligible to now
17 maintain DOE employment. So, yes, it is a job requirement, a
18 lawful one, and one that the case law cited to in DOE's briefs
19 supports that DOE can separate them for falling out of
20 compliance with that lawful job requirement.

21 MS. KOLKER: Your Honor, if I may?

22 THE COURT: This is counsel for the UFT. Yes,
23 ma'am.

24 MS. KOLKER: As Your Honor noted earlier, if the
25 union disagrees with this particular position that the DOE is

1 taking, I -- I think we should also take a step back if we
2 can. The only thing that has happened so far is that people
3 have been put on leave without pay pending these various
4 deadlines to choose their options and that is what the DOE
5 addressed in its papers.

6 This notion of what happens after December 1st, the
7 DOE hasn't done it yet so I don't believe that it's necessary
8 to address what the due process -- what due process attaches
9 or what the DOE doesn't attach once they take those actions
10 because they haven't taken those actions yet and the union has
11 not had a chance to address it, challenge it or do whatever
12 it's going to do about it.

13 I don't that we need to decide that future issue
14 which hasn't happened yet and if that is something the Court
15 believes it would like to address, the unions would like to do
16 additional briefs on the issue of due process because it is if
17 union's view that the health order actually does not create a
18 job requirement, it does not speak to employment in any way.
19 It creates a requirement that people entering a specific
20 facility be vaccinated or because of the union's challenge in
21 state court, the mandate was amended to include the fact or
22 there is a reasonable accommodation as required under law
23 based on medical exemption or a religious exemption.

24 That right there tells you that it's not a blanket
25 requirement. Not only that but school buildings that students

1 attend are not the only facilities of the DOE and it's not the
2 only way that teachers and other staff can work at the DOE.
3 These 100 people that got accommodations, right, are doing
4 something. They're not vaccinated, they're not entering the
5 school building. So the union doesn't believe it's a
6 requirement like a residency requirement which literally is a
7 law that prohibits them from employing a person who doesn't
8 meet that requirement. The health order doesn't say --
9 doesn't say anything about employment. It doesn't say
10 anything about people taken off pay, given health, not given
11 health benefits, continue them or not.

12 Now, the DOE may take the position that they have a
13 really winning disciplinary claim against these people, a
14 disciplinary charge against them because of the mandate and
15 because of the circumstances but that belief does not deprive
16 the individual members of their right to the charges and the
17 hearing, which is the union's position.

18 Again, I don't actually think because the DOE hasn't
19 taken these actions, and so they haven't been addressed, that
20 it's necessary to determining the current application, which
21 is premised, in large part, about the current removal from pay
22 with continuing benefits and the various options. I would
23 also just like to clarify one point about the *Kane* case that
24 was mentioned earlier. The *Kane* case is limited to whether or
25 not the accommodation parameters for religious accommodation

1 within the arbitration award and how it's been functioning
2 meet all of the requirements of federal law.

3 And the question there is not about whether the
4 award is valid or other components of the award are valid;
5 it's whether or not the parameters of the accommodation
6 evaluation should be adjusted in some way and as counsel
7 stated that's still pending but it is limited to that
8 component of the process set up by the award.

9 THE COURT: All right. Thank you. The Second
10 Circuit has this under advisement. It's a slightly different
11 issue, but it's still related. I did not understand that the
12 plaintiff was challenging in this case the whole arbitration
13 award and its validity because it wasn't mentioned really in
14 the complaint or memoranda of law. There wasn't anything
15 really devoted to it. I think I have heard from the
16 plaintiff's counsel on this issue here at oral argument.

17 I think Mr. Graff -- and let me just say to your
18 hardworking, treasured teachers, administrators and all who
19 work within the DOE are to be respected that the law is not
20 currently favoring your position with regard to likelihood of
21 success on the merits of irreparable harm. You are seeking
22 injunctive relief on an expedited basis. There are two issues
23 that draw my attention.

24 One is that there was a delay in seeking relief at
25 all, even in the face of knowing since August that this was

1 coming. I understand that certain plaintiffs may have or
2 certain teachers may have had to make decisions and it is a
3 shifting landscape at various times, but really you brought
4 this challenge in the latter half of November, just shy of the
5 November 30th deadline and the December 1st deadlines where
6 other acts would be taken by the DOE against those who remain
7 unvaccinated and who did not invoke any of their remedies
8 under the arbitration award, who did not pursue an appeal and
9 who did not take an option to at least remain on some status
10 with the DOE.

11 The second factor is that the cases that have looked
12 at this so far have upheld the ability of the City's agencies
13 to require a vaccine. And with regard to the schools,
14 *Maniscalco* and *Kane*, those cases have recognized the critical
15 role that live education plays in the life of and the ability
16 of young people who are within the system to learn and the
17 adverse impacts that COVID brings and risks that COVID brings
18 to students and their families and the teachers who are in
19 those environments.

20 I think also that the Second Circuit has noted that
21 delay generally undercuts the urgency that -- which you bring
22 to this case for injunctive relief. There was a fairly
23 significant delay and I think the Circuit has also held that
24 the loss of pay and one's position is not the kind of injury
25 that injunctive relief is designed to address because

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1 ultimately if the plaintiffs prevail, money damages are
2 available.

3 And I'm not saying this lightly because everybody
4 needs a paycheck. So getting money a year or two or three
5 down the road is not necessarily going to be helpful to people
6 today who are not being paid especially as we approach the
7 holidays and the end of the year. It's a very difficult time.

8 I think that the position of the DOE and the UFT are
9 at odds. I believe the UFT is asking me not to decide the
10 issue now. I don't know what the DOE's view is. The
11 plaintiff --

12 And I am also welcoming your view on this point. We
13 don't know what --

14 I think the DOE has been as candid as it can be
15 right now about what will happen on December 1st to that small
16 group of employees who haven't taken particular steps which
17 are still available to them. But you are probably well aware
18 of the case law that says there is no fundamental
19 Constitutional right to a particular job or related property
20 interest related to their employment. And the conduct I have
21 to examine is whether there is a pre or post deprivation
22 process. Whether or not you and your clients agree that the
23 pre-deprivation process is appropriate, there is a process,
24 but --

25 And I respect the fact that some plaintiffs or the

1 majority of your clients have opted not to avail themselves of
2 it, but I think the DOE has been pretty frank today about what
3 will happen to that group who don't invoke any process at all
4 that come to court seeking injunctive relief.

5 The post deprivation process I think -- the union
6 takes the position that, yes, if they become separated they
7 will take action or expect to take action on behalf of their
8 members.

9 Am I correct about that?

10 MS. KOLKER: Yes, Your Honor.

11 THE COURT: Now, one thing is we don't have an
12 understanding as to why the plaintiff didn't sue the unions
13 that are representing the administrators and supervisors --

14 MS. KOLKER: The --

15 THE COURT: The administrator supervisors and
16 principals for those who entered into the agreement on behalf
17 of the other employees. DC 37 -- are you alleging that CSA
18 and DC 37 are also colluding or somehow acted unlawfully or
19 unlawfully not accepting grievances?

20 MR. GRAFF: I have to speak to my clients about
21 that.

22 THE COURT: Why did you only sue the UFT? That's my
23 bottom line question when we have three other unions who are
24 representing the various plaintiffs that you represent.

25 MR. GRAFF: Because a large majority, a super

1 majority, of my clients are UFT employees and their complaint
2 was with the UFT.

3 THE COURT: So you can say that the members of the
4 CSA or DC 37 don't have grievance with their unions and the
5 processes and awards that they invoked.

6 MR. GRAFF: They have a different situation because
7 of the collective bargaining negotiations -- this was an award
8 of the arbitrator that we have challenged and we've discussed
9 today whereas the DC 37 entered into a collective bargaining
10 agreement which was a different procedural implementation of
11 the rules.

12 THE COURT: They might have gotten there differently
13 but the effect according to the UFT is the same in that the
14 agreement has been altered or amended to include provisions
15 for seeking accommodation and seeking appeals, et cetera and
16 for asking for extended benefits, et cetera. So it just seems
17 inconsistent or makes it difficult to understand why only one
18 union has been sued here when you represent this broad panoply
19 of clients across the spectrum of teachers, administrators and
20 DC 37 employees.

21 MR. GRAFF: I understand, Your Honor.

22 THE COURT: Do you have a response?

23 MR. GRAFF: There are additional plaintiffs and I
24 would ask to amend the complaint. Obviously there hasn't been
25 an answer yet and I don't know what the Court's outcome on the

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1 motion. I anticipate I would amend to add the unions. I
2 would add those defendants in my amended complaint. I don't
3 have them today in my complaint.

4 THE COURT: There's no motion to dismiss right now.
5 We're just here to see whether injunctive relief should be
6 ordered.

7 MR. GRAFF: Understood.

8 THE COURT: I do not know whether the defendants
9 would be moving to dismiss, maybe they will someday, but
10 that's not before me right now.

11 Why aren't damages sufficient or, you know,
12 reinstatement sufficient relief and why is injunctive relief
13 required?

14 MR. GRAFF: Right now there are a number of
15 plaintiffs. All of them who are on unpaid leave and while
16 money can give them a future right now they need their pay and
17 there are -- our argument is that there's a Constitutional law
18 violation and Constitutional violations, they in themselves
19 are irreparable harm. And while what they're arguing is that
20 in Second Circuit cases where the plaintiffs have a property
21 interest in their pay, that that's a violation and therefore
22 irreparable harm that's ongoing day after day.

23 THE COURT: Would you give me an explanation about
24 the delay that has gone on since your clients first became
25 aware that this was required and that there would be

1 consequences?

2 MR. GRAFF: Apparently -- they have not been off --
3 they've only been off pay since sometime in late to
4 mid-October and there hasn't been an unreasonable delay in
5 processing it. The group of plaintiffs have been working on
6 other cases and we met with them for the first time last
7 Monday and as soon as we were part of the case we got the
8 affidavits together and put everything together and filed as
9 quickly as we could. There has been no unreasonable delay.

10 THE COURT: Well, that's a call for me; isn't it?

11 MR. GRAFF: Yes, it is.

12 THE COURT: Unless anybody has something to say I
13 can take it under advisement. I just got word that Courtroom
14 6-A can serve as an overflow room, but I think knows folks are
15 not -- I'm assuming everybody who is here is in the courtroom.
16 Maybe there are folks outside.

17 We also have word that those who are on chats are
18 chatting a lot about this proceeding. It may be something
19 that they would want to do offline, because we can read all of
20 their chats. I don't know what's going on in the chat room.
21 We made the forum available for folks to listen and to
22 understand what's going on. Just as the folks who are here in
23 the courtroom, they're being respectful and not chatting.
24 Apparently some of the spectators are chatting and we are
25 reading the chats or we're able to read the chats and it's --

1 you know, it's not a really a forum for doing that.

2 So, I would say for those who are listening and can
3 hear me, you might want to refrain because this is not an
4 appropriate use of the Court's facilities to be chatting away
5 during a court proceeding.

6 In any event, is there anything else that any of
7 parties want to bring to my attention?

8 MR. GRAFF: My only concern is that if the Court
9 does not address the December 1st issue my, clients are going
10 to be in limbo. What's going to happen to them December 1st,
11 whether the Union's argument is going to prevail or the DOE's
12 arguments are going to prevail and I would ask the Court to
13 take that under advisement and not allow the weekend to go by
14 or whenever the Court makes a decision to not allow it to be
15 in limbo and there should be some finality or knowledge of
16 what their risks are.

17 THE COURT: We're going to do our best. We have
18 been working as hard as we can through the weekend and into
19 the night. It might have behooved you, as I said, to have
20 given us more time. Maybe I shouldn't observe that either,
21 but I am trying to get to the point where we can makes a
22 decision. I think the union had asked for additional time to
23 brief December 1st. Do I understand you correctly?

24 MS. KOLKER: Your Honor, if the Court is going to
25 rule on whether -- if the Court is going to address the

1 question of whether or not due process should attach, should
2 the DOE seek to terminate people after December 1st based on
3 their argument that this is a qualification and they can just
4 summarily terminate, the union would ask for an opportunity to
5 brief that specific issue on whether due process does attach
6 because we do disagree. The union is anticipating -- you
7 know, waiting to see what the DOE is going to do and is going
8 to respond accordingly, but since the DOE has not taken
9 actions yet and these general statements that have been made
10 as the Court observed as frankly as they can, but the general
11 statements about their overall intent, we don't know when this
12 is going to happen and what specific form it's going to take.

13 And, so, if it is something the Court is going to
14 decide we would like to brief that specific issue.

15 THE COURT: Do you want to be heard.

16 MS. O'CONNOR: Yes, Your Honor. I agree with
17 Ms. Kolker just as an initial matter that the Court need not
18 reach that question in order to resolve the motion that's
19 before Your Honor right now. As we started with, plaintiffs
20 do not have standing to challenge this arbitration award nor
21 have they demonstrated any irreparable harm that would flow
22 from that arbitration award.

23 While, along with Your Honor I understand that the
24 deprivation of a paycheck and ultimately of employment is
25 significant, the case law is quite firm that that does not

1 represent irreparable harm including if it means that an
2 individual loses the benefits of employment like pension
3 credits or other credits. All of those harms as the Second
4 Circuit has indicated over and over, that that is reparable.
5 So, the plaintiffs cannot overcome those initial two hurdles
6 of standing and demonstrating irreparable harm.

7 An irreparable harm is the most important factor
8 when determining an injunction and here, as counsel noted in
9 his papers, with respect to the leave without pay issue it's a
10 mandatory injunction. We're not preserving the status quo.
11 We're reversing it and it's a higher standard. I agree with
12 Ms. Kolker that the Court may not reach that December 1 issue
13 in order to determine whether or not plaintiffs have met the
14 threshold for preliminary injunction. Certainly, I'm sure the
15 unions and the city will be discussing the December 1 deadline
16 in the coming days.

17 THE COURT: I mean, I would like to think that that
18 the UFT and the DOE can come to some sort of agreement about
19 process and qualifications, et cetera and that you would me
20 apprised. I agree the plaintiff framed the complaint, the
21 plaintiff presented the issues for my decision and that's what
22 I should be deciding, not something that -- I understand why
23 it's important, I absolutely understand why it's important,
24 but that's not what's before me.

25 MR. GRAFF: Your Honor, we did --

1 THE COURT: And if it is before me, certainly the
2 defendants have made pretty clear that they want an
3 opportunity to respond and brief the processes, the
4 qualification issue, it is.

5 MS. KOLKER: Your Honor, just in terms of the
6 timing, we submitted our papers, we being the DOE defendant
7 and the UFT defendants basically at the same time. We were
8 not able to address in our papers this because we submitted
9 the papers simultaneously and so if that is going to be an
10 issue I think that's something we would both like to brief and
11 of course the parties will be in communication with each other
12 and we will keep the Court apprised.

13 THE COURT: What logically makes sense to me, sir,
14 Mr. Graff, is that I address what's before me. If there's
15 more and you're expanding the scope of what you need me to
16 weigh in on, you will do that and the parties will be given a
17 briefing opportunity so that I can be fully informed because
18 it may be that there is going to be discussion now. I didn't
19 give anyone a lot of time based on what I was given at 5
20 o'clock late last week, but, you know, I thought it was
21 important to at least have this and address the issues. I
22 expect that I will be able to issue a decision very soon on
23 your motion as it currently is framed.

24 MR. GRAFF: One of the requested reliefs in the
25 order to show cause is a request to stay the December 1st

1 deadline.

2 THE COURT: Right, but what we don't know, given the
3 defendant's various views of this is, is there going to be
4 irreparable harm. Is there a due process, is this process as
5 of December 1 deficient in some way? I think it would be a
6 good idea to hear more. I know you are taking very different
7 positions and that did trouble me because the DOE is going to
8 do what it's going to do and then the union is going to react.
9 From what I understand, you are planning to separate those
10 folks on December 1 who fall into those categories that you
11 described is that correct and get notices?

12 MS. O'CONNOR: It may not be on December 1, Your
13 Honor. I can't give a date on which that will happen but that
14 is the intention that on a date after December 1 that yes they
15 will be provided notice that they are or will be separated.

16 THE COURT: But the language "seek to separate"
17 which I think you relied on that "seek to" language, what does
18 that mean? Because it doesn't sound like what you're
19 describing is seeking, i.e., you know, there's some process
20 involved. It's just here is your notice goodbye. Is that
21 what you are thinking?

22 MS. O'CONNOR: The language of the order provides
23 that DOE unilaterally --

24 THE COURT: Seeks.

25 MS. O'CONNOR: Seeks to separate. And in DOE's

1 estimation that equates to providing notice that they are or
2 will be separated and provided that to the employee that there
3 is no other process owed.

4 THE COURT: Well, I think for December 1 to really
5 be fully understood, I think you have to -- both parties have
6 to really address how this becomes a job qualification if, as
7 the UFT points out, the DOE is relying on the Department of
8 Health and the Department of Health doesn't describe the
9 vaccine mandate as a job qualification for the City of New
10 York for current employees.

11 MS. O'CONNOR: And that may be an issue as to the
12 merits of plaintiff's due process arguments but that's not a
13 question that needs to be reached in order to resolve the
14 instant application for a preliminary or mandatory injunction.
15 That's the relief that plaintiffs are seeking. They are
16 saying you have violated our due process rights, but that's a
17 merits question. And throughout discovery and throughout a
18 fully briefed set of papers, the Court can make a decision on
19 that.

20 But with respect to the instant application, it's
21 clear that plaintiffs have not satisfied the hefty burden that
22 they need to in order to receive the relief that they're
23 seeking in this instant motion and I will just -- I will leave
24 it there.

25 THE COURT: All right. But you recognize he did ask

1 for injunction against the 12/1 seek to separate part of the
2 award; correct?

3 MS. O'CONNOR: Correct, Your Honor, and the harm
4 that flows from that is separation of employment which is not
5 irreparable.

6 THE COURT: Okay, thank you. I am going to address
7 the motion as you presented it. I think that's logically the
8 best way to proceed. I don't control what you bring to me. I
9 just know what I decide and if you are going to pursue or seek
10 relief specifically, it seems to me the defendants want to be
11 heard on the December 1 process. Have you said everything you
12 want to say on the DOE's first process that you've got a
13 little better understanding of what the DOE intends?

14 MR. GRAFF: Yes, Your Honor.

15 THE COURT: You have said everything, you don't need
16 to make further submissions.

17 MR. GRAFF: I have said enough today. I would like
18 a chance to submit a response to what the DOE wants to do.

19 THE COURT: I suggest you submit your papers by a
20 date certain. I would really like to not to have to work over
21 Thanksgiving but I will if I have to, but really I would
22 rather not. I don't think you would either. But let's set up
23 a time frame for you to -- the plaintiff to submit more on
24 December 1st and then we will hear from defendants and
25 hopefully the defense will speak to each other in the

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1 meantime. So, Mr. Graff what are you proposing?

2 MR. GRAFF: Your Honor, my son's Bar Mitzvah is
3 Saturday.

4 THE COURT: Congratulations. The timing couldn't be
5 worse. I think your clients are still chatting away, so
6 whatever it's worth -- maybe they don't hear me or they don't
7 care, but we will pay attention to it.

8 MR. GRAFF: Your Honor, how much time do the
9 defendants need to respond?

10 THE COURT: Let's start with you. I don't want to
11 start with a response.

12 MR. GRAFF: Your Honor, I'm starting a trial on
13 December 1st. I guess the 30th.

14 THE COURT: So you will supplement your briefing
15 challenging the December 1 action; is that right? I don't
16 want to frame your issue for you. I want you to tell me what
17 you're doing on November 30th.

18 MR. GRAFF: I will be submitting a brief with
19 respect to the job requirement issue and whether or not they
20 can be separated without the processes.

21 THE COURT: Okay. How much time do the defendant's
22 need?

23 MS. O'CONNOR: Your Honor, I'm concerned about the
24 timing of submitting additional briefing. I'm assuming that
25 this is still briefing on deciding the preliminary injunction

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1 motion?

2 THE COURT: No, no. I'm going to decide the
3 preliminary injunction motion as it currently has been
4 presented to me as soon as I can and it will be before
5 Thanksgiving.

6 MS. O'CONNOR: I see Your Honor. Thank you.

7 THE COURT: This is the December 1st, what happens
8 when the DOE unilaterally seeks to separate.

9 MS. O'CONNOR: Yes, Your Honor. Sorry, I
10 understand. I was confused for a minute.

11 THE COURT: They are submitting November 30th.

12 MS. O'CONNOR: I am just thinking about whether or
13 not since we did discuss a motion to dismiss, if it may be
14 more efficient to brief this issue in connection with a motion
15 to dismiss if we're going to brief it once. I had not
16 conferred with counsel for UFT, but as you can see from the
17 DOE's papers we believe there's a very strong likelihood of
18 success for an anticipated motion to dismiss. So I am just
19 wondering if we're going to supplement the briefing in
20 connection with the due process argument, what process if any
21 is owed pre or post December 1 if that may be accomplished in
22 connection with a motion to dismiss.

23 THE COURT: Well, this is the thing with regard to
24 summary judgment motion to dismiss. I think it's more
25 efficient honestly, if the plaintiff is going to be amending,

1 that they do so before you engage in more motion practice.
2 That way I can decide the best iteration of the plaintiff's
3 claims without, you know, giving another amendment to the
4 complaint and then being back where we started.

5 I think maybe the plaintiffs -- I'm not trying to
6 speak for you at all, but I think they're interest is on
7 December 1 and some of them want to know -- teasing out what
8 the DOE is going to do more clearly, the authority upon which
9 they rely, hearing from the union as to why they don't agree
10 with you in terms of your qualification argument. And, so, I
11 think we can segregate those two issues and then you can
12 always move to dismiss, but I would first want to give the
13 plaintiff an opportunity to amend the pleading on behalf of
14 the plaintiffs. Some of them may drop out, right, so that
15 would be the best way forward, I think.

16 MS. O'CONNOR: Your Honor, would the thought be
17 plaintiffs would submit an amended pleading by November 30th?

18 THE COURT: No, no. They just want to brief
19 specifically the issue whether the December 1st processes
20 violate due process or lack of processes and also whether or
21 not the DOE can appropriately rely on the vaccine mandate as a
22 qualification of employment. If we could have a week to
23 respond? So December 7th?

24 Is that sufficient for the union too?

25 MS. KOLKER: The week is sufficient for the union.

1 We want to note that as the Court observed earlier only the
2 UFT has been named here and the other unions have not been
3 involved and the issue of due process is different process
4 that is due to have the different work forces that are covered
5 under other unions --

6 THE COURT: I am sorry. But the processes are the
7 same.

8 MS. KOLKER: They differ across the unions. There
9 are different contractual provisions so the week is fine for
10 us. We can get the papers done on that schedule. We just
11 wanted to remind the Court that only one of the unions is
12 represented today.

13 THE COURT: But that was the plaintiff's choice. I
14 don't know why they decided that. I don't know why. Maybe
15 they're not as concerned about what their unions did as the
16 UFT members are.

17 Mr. Klinger?

18 MR. KLINGER: Your Honor, we wanted to clarify and
19 it may be that we will work with the Corp. Counsel. The other
20 unions, they are similar to the UFT DC 37 which as counsel
21 said negotiated their own agreement. They are under a
22 different statutory mechanism. What we would like to do with
23 the Court's permission is to apprise the other unions that are
24 impacted as part of the DOE workforce that this issue is being
25 considered by the Court and then let those unions decide if

1 there's something they want to do or not.

2 THE COURT: Like intervene?

3 MR. KLINGER: Precisely, Your Honor.

4 THE COURT: Unless the plaintiff is going to say
5 here right now that they have no other beef with the other
6 unions. We kept reading, and I didn't do a word-for-word
7 comparison, but there was a general agreement that these
8 mirrored one another and one flowed from the other and they're
9 pretty much similar, but I understand that the statutory
10 scheme governing DC 37 is different than the Education Law.

11 MR. KLINGER: Yes, Your Honor.

12 MR. GRAFF: I'm not going to take the position right
13 now that we don't have any issues with them. I don't want to
14 waive that at this time and we would amend when appropriate
15 and I would join in the UFT's position that they inform the
16 other unions if they want to join in or submit or intervene in
17 some way with the Court's permission.

18 THE COURT: The problem I am having is that you
19 don't really allege anything against those unions why in the
20 heck would they want to intervene? Their conduct is not being
21 challenged in your complaint. Why would they say sue me or --
22 I think it might be more efficient in the end, but it seems to
23 me that if I find that the mandate is a job qualification or
24 isn't or if I find that the post separation or the processes
25 leading up to the separation are consistent with due process

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1 or they're not, it will affect all of those employees.

2 So I'm not really sure that -- I just wanted to
3 understand for my own sake what your strategy was and whether
4 there was a reason for what you did but it sounds like there
5 wasn't.

6 MR. GRAFF: There wasn't.

7 THE COURT: There wasn't?

8 MR. GRAFF: There was not.

9 THE COURT: Can both the DOE and the UFT submit a
10 response to the plaintiff's further supplemental briefing
11 regarding December 1? Can they do that by December 7th both
12 defendants?

13 MS. O'CONNOR: Yes, Your Honor.

14 MS. KOLKER: Yes, Your Honor.

15 THE COURT: Okay. And, again, would you please
16 deliver two courtesy copies to my chambers because trying to
17 print and collate of these papers is difficult. Is there
18 anything else I need to address?

19 MR. GRAFF: No, Your Honor. Thank you for your
20 time.

21 THE COURT: Okay. Thank you, everybody.

22 MS. O'CONNOR: Thank you, Your Honor.

23 MS. KOLKER: Thank you, Your Honor.

24 (Matter adjourned.)

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